

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

WESTWOOD DEVELOPMENT	:	
PARTNERS, LLC, a Delaware	:	C.A. No: K10C-08-018 RBY
Limited Liability Company,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
STEPHEN G. DRAPER, individually	:	
and as Trustee under the Revocable	:	
Trust Agreement of Stephen G. Draper	:	
dated January 29, 1997 and as Trustee	:	
under the Revocable Trust Agreement of	:	
Clara Emily Draper date January 29, 1997,	:	
and CLARA EMILY DRAPER and	:	
MICHELE E. GARDNER,	:	
	:	
Defendants.	:	

*Submitted: December 2, 2011*

*Decided: March 29, 2012*

*Upon Consideration of Plaintiff's  
Motion for Summary Judgment of Count I  
of Defendants' Counterclaim*

**DENIED**  
**OPINION AND ORDER**

Richard A. Forsten, Esq., James D. Taylor, Esq., and Michael J. Farnan, Esq., Saul, Ewing, LLP, Wilmington, Delaware for Plaintiffs.

Kathi A. Karsnitz, Esq., Georgetown, Delaware for Defendants Stephen G. Draper, individually and as Trustee and Clara Emily Draper.

Michael A. Arrington, Esq., Parkowski, Guerke & Swayze, P.A., Wilmington, Delaware for Defendant Michele E. Gardner.

Young, J.

### **SUMMARY**

\_\_\_\_\_Westwood Development Partners, LLC (Plaintiff) instituted this action seeking return of a security deposit pursuant to contract. In Count I of their counterclaim, Stephen and Emily Draper (Defendants) seek damages for breach of contract. Because a prior ruling at the Chancery Court precluded an action for specific damages, returning the money damages claim by Defendants to the Superior Court, that questions remains open to be determined on the dispute of facts. Plaintiff's instant motion for summary judgment of that claim is **DENIED**.

### **FACTS**

\_\_\_\_\_Plaintiff entered into an agreement of sale with Stephen and Emily Draper (Defendants) on October 17, 2005. The agreement was for the sale of 137 acres of land, previously used as a mobile home park, from Defendant to Plaintiff for a purchase price of \$6,000,000. Subject to certain exceptions within the agreement, described, in pertinent part, herein, the property was to be sold "as-is." Pursuant to paragraph two of the agreement, upon execution thereof, Plaintiff provided Defendants with a \$1,000,000 security deposit. The deposit was agreed to be, generally, non-refundable.

Paragraph nine of the agreement affords Plaintiff the right to terminate the agreement, and demand return of the deposit, if Defendants fail to supply "satisfactory Phase I and Phase II environmental audit reports prior to final settlement." Phase I and Phase II environmental audit reports identify and address certain environmental concerns existing on a subject property. Evidently, such reports are frequently prepared in connection with a sale of the property. Phase I reports are more cursory in nature, identifying potential concerns, and directing

further investigation if necessary. Phase II reports delve more deeply into concerns raised by a Phase I report. In regard to these reports, paragraph nine of the agreement states:

“Seller shall supply to Purchaser satisfactory Phase I and Phase II environmental audit reports prior to final settlement; and if Seller shall fail to do so, Purchaser may accept the Property in its condition as reported or it may elect to terminate this Agreement, in which case the said deposit shall be refunded promptly to Purchaser.”

\_\_\_\_\_ Paragraph twelve of the agreement provides for termination of the contract, by either party, in the event that the agreement is not consummated within three years of execution. Because the paragraph does not provide for the return of the deposit, the deposit remains non-refundable if the agreement is terminated in accordance therewith. In pertinent part, paragraph twelve states:

“This agreement shall terminate at the written election of either party at any time after three (3) years from the date of this Agreement.”

On September 23, 2008 and October 20, 2008, Plaintiff’s counsel wrote Defendants’ counsel expressing the intent to terminate the agreement, in part, under paragraph nine. Defendants refused to return the security deposit. As a result, Plaintiff instituted this action seeking return of the deposit pursuant to paragraph nine of the agreement. Before the Court had an opportunity to rule on Plaintiff’s claim, Defendants asserted a counterclaim for specific performance. The matter was transferred to the Court of Chancery by stipulation of the parties.

The Court of Chancery held that Defendants were not entitled to specific

performance.<sup>1</sup> The court did not address the issue in regard to monetary damages to which Defendants may, or may not be, entitled. After that ruling, the matter was transferred back to this Court.

This Court adopted the Court of Chancery's findings in denying Defendants' specific performance motion to dismiss.<sup>2</sup> Soon thereafter, Defendants asserted a counterclaim seeking breach of contract damages. Plaintiff filed the instant motion for summary judgment of that claim.

### **STANDARD OF REVIEW**

\_\_\_\_ Summary judgment is appropriate where the record exhibits no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.<sup>3</sup> The movant bears the initial burden of establishing that no genuine issue of material fact exists.<sup>4</sup> Upon making that showing, the burden shifts to the non-movant to show evidence to the contrary.<sup>5</sup> "Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances."<sup>6</sup> When considering a motion for summary judgment, the Court

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<sup>1</sup> *Draper v. Westwood Development Partners, LLC*, 2010 WL 2432896 (Del. Ch. June 16, 2010).

<sup>2</sup> *Westwood Development Partners, LLC v. Draper*, 2010 WL 8250846 (Del. Super. Nov. 24, 2010).

<sup>3</sup> *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

<sup>4</sup> *Ebersole v. Lowengrub*, 54 Del. 463 (Del. 1962).

<sup>5</sup> *Id.*

<sup>6</sup> *Tedesco*, 2006 WL 1817086 at \*1.

considers the facts in the light most favorable to the non-movant.<sup>7</sup>

### **DISCUSSION**

\_\_\_\_\_Plaintiff's motion argues that Defendants' breach of contract claim assumes that a breach of the agreement occurred. According to Plaintiff's reading of the Court of Chancery decision, the contract was terminated, therefore there could not have been a breach. As a result, Plaintiff contends that it is entitled to summary judgment, because Defendants have no basis to claim damages.

Defendants argue that, if Plaintiff terminated the agreement under paragraph nine, it did so in bad faith. From that perspective, because Plaintiff had a duty not to act in bad faith, Defendants contend that Plaintiff's termination of the agreement was tantamount to a breach, thereby entitling Defendants to damages.

The Court of Chancery's ruling was in regard to Defendants' action for specific performance only. Specifically, the court ruled that, by seeking specific performance, Defendants sought to hold Plaintiff to the terms of the contract. Because paragraph twelve provided for at-will termination after three years, holding Plaintiff to the terms of the contract allowed it to terminate the contract under paragraph twelve. Because Plaintiff did so in the October 20, 2008 letter, the Chancery Court held that specific performance was precluded.<sup>8</sup> That court noted that Defendants' entitlement to monetary damages was a matter that must be litigated in this Court.<sup>9</sup> Therefore, neither that decision, nor this Court's adoption thereof, serves to preclude Defendants'

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<sup>7</sup> *Id.*

<sup>8</sup> *Draper*, 2010 WL 2432896 at \*4.

<sup>9</sup> *Id.* at \*5.

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claim for damages.

That being the case, Defendants' claim can sustain Plaintiff's motion only if there was, in fact, a breach. "Every contract imposes a duty of good faith in its performance."<sup>10</sup> "The requirement of good faith extends to the satisfaction of contractual conditions or contingencies."<sup>11</sup> Any invocation by Plaintiff of paragraph nine required, implicitly, that Plaintiff not exercise that right in bad faith. Defendants contend that Plaintiff, in bad faith, manufactured an excuse to terminate the agreement and seek more favorable terms. The veracity of that accusation is a question of fact, precluding the entry of summary judgment.

### **CONCLUSION**

Plaintiff's motion for summary judgment of Count I of Defendants' counterclaim is **DENIED**.

**SO ORDERED** this 29th day of March, 2012.

\_\_\_\_\_  
/s/ Robert B. Young  
J.

RBV/sal  
cc: Opinion Distribution  
File

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<sup>10</sup> *Rehoboth Resort Realty, Inc. v. Brittingham Enterprises, Inc.*, 1992 WL 207262 at \*2 (Del. Super. July 21, 1992) (citing Restatement (Second) Contracts § 205 (1981)).

<sup>11</sup> *Id.* (citing *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984)).